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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1497

DONALD M. HEAVRIN - - - - Petitioner

versus

KENTUCKY BAR ASSOCIATION - - Respondent

BRIEF OF AMICUS CURIAE, JEFFERSON COUNTY BAR ASSOCIATION, INC. IN SUPPORT OF THE PETITIONER, DONALD M. HEAVRIN'S, PETITION FOR WRIT OF CERTIORARI

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May it please the Court:

The parties, Donald M. Heavrin, petitioner, and the Kentucky Bar Association, respondent, have each consented to the Jefferson County Bar Association, Inc. filing a brief amicus curiae in support of petitioner's petition for writ of certiorari to the Supreme Court of Kentucky. (Appendix 13).

The Jefferson County Bar Association, Inc., hereafter designated the "Jefferson County Bar," is a nonprofit Kentucky corporation whose members are duly licensed to practice law in the Commonwealth of Kentucky and regularly practice law in Jefferson County, Kentucky, the county wherein the petitioner is alleged to have committed the acts which led to his suspension and these proceedings in this Honorable Court.

By resolution the board of directors of the Jefferson County Bar resolved to file an amicus curiae brief in support of petitioner's petition for writ of certiorari.

Amicus curiae believes this may be one of the most important cases ever presented to this Court relative to the disciplinary process for lawyers and after reviewing the record, the opinion of the Supreme Court of Kentucky, and the petition for writ of certiorari filed by petitioner we submit there is a clear showing that petitioner was denied due process of law and equal protection of the law.

At the outset the Jefferson County Bar should say that it does not support lawyers who fail to adhere to acceptable standards of conduct and lawyers who violate acceptable standards of conduct should be judged according to their actions and the law and this brief should not be construed as taking a contrary position.

The Jefferson County Bar is disturbed about the lack of due process of law and the lack of equal protection of the law as shown by the record of this case.

First, the Jefferson County Bar is concerned that the Kentucky Bar Association would take the position that it was not required to give petitioner a copy of the original complaint filed against him. (Petitioner's appendix, page 48, "IT HAS BEEN THE UNWAIVERING POSITION OF COMPLAINANT THAT RESPONDENT HAS ABSOLUTELY NO RIGHT WHATSOEVER TO A COPY OF THE ACTUAL COMPLAINT UNDER THE RULES OF THE SUPREME COURT OF KENTUCKY OR THE DUE PROCESS CLAUSE OF THE FEDERAL AND STATE CONSTITUTIONS."). This statement was made by the Kentucky Bar Association notwithstanding the rule in effect at the time the complaint was made; (former RCA 3.160, Initiation of Disciplinary Cases, Petitioner's Appendix, page 48, "Any complaint against an attorney for unprofessional conduct shall be filed with the director who shall promptly notify the attorney by certified mail of the complaint and inform him that he has fifteen days to acknowledge *receipt* of the *complaint* or respond to the merits.") If a lawyer is charged with a violation of disciplinary rules but cannot see a copy of the complaint or charging documents, he cannot acknowledge receipt of same nor respond to the merits. Despite the fact that dozens of pages were written on both sides of this issue the Kentucky Supreme Court did not face the issue but ignored it. In reviewing the record of this case the Jefferson County Bar wonders who filed the complaint, who initially suggested the petitioner violated acceptable standards of conduct governing the practice of law, what the violations were, and who was injured.

The facts related in *Kentucky Bar Association* v. *Heavrin,* Ky., 573 S. W. 2d 916, concern Heavrin's dealings with Donoghoe, the payee's of certain checks and the borrowing of funds from Bodenbender. Even though Heavrin was found not guilty of making a misrepresentation to Bodenbender the majority of the Kentucky Supreme Court refers to that transaction as if Heavrin had done something wrong, but a review of the record indicates there was no misrepresentation and Bodenbender was completely satisfied in all aspects of his relationship with Heavrin and he was not a complainant.

The payees of certain checks (whom Heavrin allegedly did not protect) were represented by competent counsel and they did not institute litigation against Heavrin or file a complaint with the Kentucky Bar Association, yet the majority of the Kentucky Supreme Court appears to consider Heavrin's relationship to the check as a type of check manipulation with consequential financial loss to the payees.

Donoghoe, a lawyer who was subsequently disbarred, employed Heavrin to represent him, was satisfied with Heavrin's professional work, instituted no litigation against him and filed no complaint with the Kentucky Bar Association.

In reviewing matters concerning Bodenbender, the payees of the check and Donoghoe, none of them have accused Heavrin of any wrongdoing or violation of any acceptable standards of conduct governing the practice of law. This causes the Jefferson County Bar to wonder who, if anyone filed a complaint against Heavrin.

In *Kentucky Bar Association* v. *Heavrin, supra,* there is a question of misrepresentation by Heavrin to employees of the Citizens Fidelity Bank and Trust Company. These matters were the subject of litigation in Jefferson Circuit Court and that court absolved Heavrin of any wrongdoing. The same result was reached by the trial committee of the Kentucky Bar Association who examined the record of the Circuit Court litigation and heard additional witnesses. Yet the Board of Governors of the Kentucky Bar Association without hearing any witnesses reached a decision contradictory to the Trial Committee of the Kentucky

Bar Association and the Jefferson Circuit Court. The Jefferson County Bar wonders why fact finding bodies are established if a Board of Governors who hears no witnesses can discard their findings of fact and opinions without comment.

The next point that disturbs the Jefferson County Bar is the fact that apparently when formal charges were lodged against Heavrin they did not indicate which particular section of the Code of Professional Responsibility Heavrin was claimed to have violated but were identified after the trial. (Petitioner's Appendix page 21). Surely a person, whether he is a lawyer or not, has the right to know the precise matters with which he is charged before the trial starts so that he can prepare a proper defense and not be prejudiced by a modification of the charges. It is easy to make charges, especially when no particular violation of the Code of Professional Responsibility is cited and the accused is not given a copy of the complaint, but it is most difficult to defend against such action and, that is what appears to have happened in this case.

A close reading of *Kentucky Bar Association* v. *Heavrin, supra,* indicates the Board of Governors and the majority of the Court found Heavrin violated Canon 9 of the Code of Ethics and DR 1-102(A)(4) and DR 9-102(A) of the Code of Professional Responsibility.

The Jefferson County Bar suggests that Canon 9 and DR 1-102 contains language which is so broad that no person, even a lawyer, can understand its proscription and the language is so subjective that it would not

pass the muster of stating a claim in a civil action or a criminal offense via a warrant or indictment. This contention is so eloquently covered in Chief Justice Palmore's dissent (Petitioner's Appendix pages 22, 23, 24) that amicus curiae sets forth this portion of the dissent in full:

> DR 9-102(A) condemns the mingling of a lawyer's funds with those of his client. No one has cited any authority for the proposition that it cannot be done with the knowledge and consent of the client. The client in this instance was Donoghoe. Everything that was done was with his knowledge and for his convenience and, to the extent that any "commingling" occurred, it was done in his very presence and under his supervision. But even if that were not a sufficient answer to the charge of commingling, there was no real commingling here anyway. $49,000 was put into one of Heavrin's accounts so that he could give Donoghoe a check instead of cash. The other $45,000 was put in his office account so that he would write a check to his escrow account in another bank and then distribute the money as directed by his client, which he did. Except for the insignificant $42 mentioned earlier in this opinion, the deposit and transfer of these funds were completed almost contemporaneously. None of the money remained in either of Heavrin's private accounts long enough to get warm, much less to find a new home. I cannot believe the members of the Board thought this through.
>
> The last references by the Board to specific rule violations are that Heavrin's conduct "constituted a reckless disregard for the rights of the payees on the checks [sic] in question and is a violation not

only of Canon 9 of the Code of Ethics in regard to Trust Funds, but also DR 1-102."

Both Canon 9 and DR-1-102 cover a good deal of territory. Canon 9 says, "A lawyer Should Avoid Even the Appearance of Professional Impropriety." The Ethical Considerations and Disciplinary Rules following Canon 9 all provide specific applications of that broad precept. Except for the matter of commingling funds, which I have already discussed, none of them comes close to this case. DR 1-102 declares it misconduct to (1) violate a Disciplinary Rule, (2) circumvent a Disciplinary Rule, (3) engage in illegal conduct involving moral turpitude, (4) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, (5) engage in conduct that is prejudicial to the administration of justice, or (6) engage in any other conduct that adversely reflects on his fitness to practice law. Thus far, I do not see that Heavrin violated or circumvented any of the Disciplinary Rules mentioned by the Board, and I do not believe anyone involved in this proceeding would claim that he engaged in illegal conduct. If he did, apparently the grand jury of Jefferson County never got word of it. Item (4), as I have suggested before, refers to intentional deceit. Item (5) pertains to the administration of justice and obviously can have no application to this case. Only Item (6), "conduct that adversely reflects on his fitness to practice law," could possibly be argued as appropriate to the charge that Heavrin disregarded the rights of the payees of the $105,000 check.

Some years ago, in Kentucky State Bar Association v. Taylor, Ky., 482 S. W. 2d 574, 582 (1972), we made the following observation: "If the canons

of ethics adopted for the legal profession were tested under the 'void for vagueness' doctrine which has spelled the doom or various breach of peace and disorderly conduct laws throughout the country it is doubtful that they would survive this case." I repeat that observation here. Although this is not a criminal case, and the principles of constitutional law applicable to criminal cases are not entirely applicable here, the right to engage in a professional practice, once earned, is a right of great value, and its loss by revocation or suspension is nearly as serious a punishment as a criminal conviction and sentence. Without attempting to research and write a law review article on the subject, I think the due process rights of a respondent in a disciplinary proceeding which may result in the loss or suspension of his license to practice can be no different from those of a defendant in a criminal case. In fact, the law under which he is being tried must be clear, and the charge must be specific. In this proceeding neither of those requirements has been satisfied.

"Conduct that adversely reflects on his fitness to practice law." But what standard? And more importantly, by whose standard? The answer is unavoidable—the subjective standard of whoever happens to be doing the judging. So far as I am concerned, that cannot be the law in a civilized society—not in this country, anyway.

Amicus believes as petitioner believes that the legal contentions here are governed by *In Re: Ruffalo,* 390 U. S. 544, 20 L. Ed. 2d 117, 88 S. Ct. 1222 and the other cases cited in the Petition for Writ of Certiorari heretofore filed.

Amicus curiae would further observe that the legal profession is under heavy assault by the press and other persons dissatisfied with its performance and adherence to appropriate standards of conduct. Much of this may have sprung from Watergate and the Jefferson County Bar is the first to note that perhaps as a group, lawyers are too sensitive to just criticism. Amicus understands that the best forum for cleaning up the legal profession is the legal profession itself. Unfortunately, however, and coincidental to the assault and complaints, the legal profession itself tends to overreact. As in the case here and other cases, it appears that shortcuts are being taken so that the legal profession can proudly announce it has disciplined lawyer X for Y conduct. This is not an unusual syndrome and it happens in other areas. Courts, legal associations, bar associations, and lawyers, of all persons, should be more careful, however, not to be caught in the clamor and should retain objectivity and basic adherence to constitutional rights.

Many of the canons contained in the Code of Professional Responsibility are so vague as to be meaningless. For example, what does the term "avoid the appearance of impropriety" mean to the average lawyer or to anyone else. What does the term "circumvent a disciplinary rule" or "engage in conduct that is prejudicial to the administration of justice," or "engage in any other conduct that adversely reflects on his fitness to practice law" mean. The problem with these canons is, of course, that they mean different things to different people. To a teetotaler, it might mean that a lawyer

should never take a drink of an alcoholic beverage, or go to a nightclub. Any lawyer who has the temerity to defend a person charged with a crime may be deemed to have engaged in conduct prejudicial to the administration of justice particularly if he succeeds in securing the acquittal of a person who is actually guilty. What is illegal conduct involving moral turpitude? Is this the same as appearance of professional impropriety. What is conduct that adversely reflects on fitness to practice law. Would this include a gambling junket to a state where gambling is legal. Would this include a divorce. How about a conviction for drunk driving.

The point is that none of these broad or vague canons can precisely apprise an attorney of the precise misconduct of which he is charged. Any one of these canons on a given day and by a given group could result in discipline being imposed to the extent of disbarment.

Amicus curiae sincerely hopes this Court will review this case and deal with these hard questions. As long as the rules are objective and reasonably precise and the rules apply equally to all and there are some objective standards for punishment, then lawyers can have no complaint. If, however, these rules are subjective to the whim and caprice of the authority who passes judgment, then such authority has a blank check to do as they wish to any lawyer at any time. This will and has had a chilling effect on many lawyers who frequently espouse unpopular causes and seek no remuneration for it.

WHEREFORE, the Jefferson County Bar Association, amicus curiae, respectfully prays that Donald M. Heavrin's Petition for Writ of Certiorari to the Supreme Court of Kentucky be granted.

Respectfully submitted,

JOSEPH G. GLASS, *Counsel and President of Jefferson County Bar Association, Amicus Curiae*

ALLEN K. GAILOR, *Counsel and Secretary for Jefferson County Bar Association, Amicus Curiae*

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

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No. 78-1497

DONALD M. HEAVRIN - - - - - *Petitioner*

v.

KENTUCKY BAR ASSOCIATION - - - *Respondent*

CONSENT OF PETITIONER, DONALD HEAVRIN, AND RESPONDENT, KENTUCKY BAR ASSOCIATION, FOR JEFFERSON COUNTY BAR ASSOCIATION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DONALD HEAVRIN'S PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF KENTUCKY

The petitioner, Donald M. Heavrin, by counsel, and the respondent, Kentucky Bar Association, by counsel, consent to Jefferson County Bar Association filing a brief amicus curiae in support of the petitioner's, Donald M. Heavrin's, Petition for Writ of Certiorari to the Supreme Court of Kentucky.

Donald M. Heavrin, Petitioner

By: (s) Henry A. Triplett
Kentucky Bar Association

By: (s) Leslie Whitmer

CERTIFICATE OF SERVICE

I hereby certify that on this 27 day of April, 1979, three (3) copies of this brief of amicus curiae of the Jefferson County Bar Association, Inc. and accompanying separate Appendix were mailed, postage prepaid, to the Honorable Leslie G. Whitmer, Director, and Mr. Michael M. Hooper, Kentucky Bar Association, 403 Wapping Street, Frankfort, Kentucky 40601, on behalf of respondent and the Honorable Henry A. Triplett of the firm of Hogan, Taylor, Denzer and Bennett, 231 South Fifth Street, Louisville, Kentucky 40202, counsel for petitioner.

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